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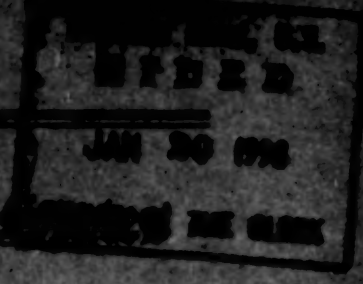

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

EASTERN ENTERPRISES,

Petitioner,

v.

KENNETH S. APFEL,
COMMISSIONER OF SOCIAL SECURITY, ET AL.,

Respondents,

v.

PEABODY HOLDING COMPANY, INC.,
EASTERN ASSOCIATED COAL CORP., AND
COAL PROPERTIES CORP.,

Respondents.

ON A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

BRIEF OF RESPONDENTS PEABODY HOLDING COMPANY, INC. EASTERN ASSOCIATED COAL CORP. AND COAL PROPERTIES CORP.

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QUESTIONS PRESENTED

1. Whether the Coal Act violates the Due Process Clause as applied to Eastern Enterprises, where the legislation requires Eastern to pay premiums for health benefits for its own retired coal miners and their beneficiaries to whom Eastern had implicitly promised lifetime health benefits and from whose labors Eastern had profited.

2. Whether the Coal Act violates the Takings Clause as applied to Eastern Enterprises, where the legislation does not deprive Eastern of all of its assets, but results merely in a shifting of liability for health care premiums for coal miners to the company that employed the miners for the longest time.

RULE 29.6 LISTING

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondents, Peabody Holding Company, Inc., Eastern Associated Coal Corp., and Coal Properties Corp., state that an ultimate parent corporation, The Energy Group, PLC, is the only parent, subsidiary (except wholly-owned subsidiaries), and affiliate that has issued shares to the public (traded on the London and New York Stock Exchanges).

LIST OF PARTIES

The Plaintiff to the proceedings below was the Petitioner, Eastern Enterprises. The Defendants to the proceedings below were the Respondents, Commissioner of the Social Security Administration (now Kenneth S. Apfel), the United Mine Workers of America Combined Benefit Fund, and the Trustees of the United Mine Workers of America Combined Benefit Fund. The Third-Party Defendants to the action below were the Respondents, Peabody Holding Company, Inc., Eastern Associated Coal Corp., and Coal Properties Corp.

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The Respondents, Peabody Holding Company, Inc ("Peabody"), Eastern Associated Coal Corp. ("EACC"), and Coal Properties Corp. ("CPC"), respectfully request that this Court affirm the judgment and opinion of the United States Court of Appeals for the First Circuit, entered on April 7, 1997. That opinion is reported as *Eastern Enterprises* v. *Chater*, 110 F.3d 150 (1st Cir. 1997) (reprinted, along with the Judgment and Orders of the District Court, in the Appendix of Eastern Enterprises' Petition for a Writ of Certiorari).

STATEMENT OF THE CASE

Eastern Enterprises ("Eastern") has asked that the Coal Act,[1] a very carefully studied, considered and debated piece of economic legislation, which seeks to spread the health care costs of retired miners and their dependents to the very companies which profited from the miners' labors, be deemed to be so lacking in any rationality as applied to Eastern, that the Court should take a step it has not taken in 60 years and hold the statute unconstitutional.[2]

Eastern asks the Court to do this even though Eastern profited for almost forty years, from 1950 to 1987, through a series of National Bituminous Coal Wage Agreements ("NBCWAs") under which the miners in question were implicitly, if not expressly, promised lifetime health benefits for themselves and their dependents. Until 1966, Eastern

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[1] Coal Industry Retiree Health Benefit Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, 3036-56, 26 U.S.C. §§ 9701-22 (the "Coal Act" or the "Act").

[2] "[T]he Supreme Court has not invalidated any piece of purely economic legislation on substantive due process grounds in more than 60 years." *Eastern Enterprises* v. *Chater*, 110 F.3d 150, 155 (1st Cir. 1997). If this Court does not find a statute of this kind unconstitutional on due process grounds, "it would be surprising indeed to discover the challenged statute nonetheless violating the Takings Clause." *Concrete Pipe and Prods., Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602, 641 (1993) (citing *Connolly* v. *Pension Benefit Guar. Corp.*, 475 U.S. 211, 223 (1986)).

earned profits directly through its coal operations. Those operations made Eastern a giant in the industry — the sixth largest coal company in the United States in the 1966 time frame.[3] RA 265.[4] From 1966 to 1987, Eastern reaped profits in the form of substantial dividends received from its wholly-owned subsidiary, Eastern Associated Coal Corp. ("EACC"), which it totally dominated and controlled. The implicit promises of lifetime health benefits made before 1966 brought Eastern and other coal operators substantial relief from the chronic labor strife in the industry. The promises also gained for Eastern and the other operators the right to mechanize the mines and drastically reduce the labor force. *See Coal Commission Report: A Report to the Secretary of Labor and the American People* (Nov. 1990) ("*Coal Commission Report*"), JA 256a.[5]

But these promises of lifetime health benefits had a "latent loophole." *LTV Steel Co.* v. *Shalala* (*In re Chateaugay Corp.*), 53 F.3d 478, 484 (2d Cir.), *cert. denied*, 116 S. Ct. 298 (1995). They were made without any prefunding requirement or withdrawal liability imposed on employers who declined to sign new NBCWAs. *Id.* The result was the creation of a system with a substantial flaw in its foundation that widened and deepened in later years, which added to the conditions

[3] While the citation here is to the 1967 Prospectus of EACC, stating that EACC was the sixth largest coal producer in the United States, one can conclude that since EACC took over most or all of Eastern's mines in 1966, that Eastern also had been an industry leader in that time frame.

[4] As used herein, "RA" refers to the Joint Appendix submitted to the United States Court of Appeals for the First Circuit under Fed. R. App. P. 30(a) and "JA" refers to the Joint Appendix filed under Sup. Ct. R. 26.

[5] The *Coal Commission Report* is the published report of the Advisory Commission on United Mine Workers of America Retiree Health Benefits (the "Coal Commission"), which had been created by the Secretary of Labor to investigate and to propose a long-term solution to the looming crises faced by the coal industry Benefit Trusts at the time. *Eastern Enterprises*, 110 F.3d at 158; JA 245a.

necessitating the passage of the Coal Act. The Coal Act was passed to ensure that the miners receive the health care benefits that had been committed and promised to them by their employers.[6] Eastern's liability under the Coal Act to date (the amount of which is vigorously denied[7]), has been limited solely to the costs of retiree health care benefits for the miners who actually worked directly for Eastern until 1966 and who never worked for EACC. JA 144a at ¶¶ 9, 10; RA 2119 at ¶¶ 3-6. Future Coal Act liability against Eastern may relate to so-called "orphan" miners but will always be directly proportional to the number of Eastern's own miners assigned under the Act. Eastern profited from the labor of all of the miners assigned to it. Eastern also gave all of these miners from whom it profited the flawed, implied promise of lifetime health benefits as retirees.

Eastern claims that the Coal Act is unfairly and unconstitutionally retroactive, arguing that the Act, as applied to Eastern, extends back almost 30 years. *See Brief of Eastern Enterprises* ("*Eastern's Brief*") at 21. Eastern's argument ignores the fact that it continued to reap substantial profits from the coal industry from 1966 through 1987 in the form of dividend payments from the profits made by its wholly-owned subsidiary, EACC. JA 145a. Eastern itself admits that those dividends totaled in excess of $100 million. *Eastern's Brief* at 6 n.13. Moreover, Eastern's domination and control of EACC through 1987 was so absolute that Eastern was a *de facto* participant in the industry until that time. *See* JA 145a-146a. Therefore, as applied to Eastern, the retroactivity of the Coal

[6] The Coal Act merged the 1950 and 1974 Benefit Trusts of the United Mine Workers of America ("UMWA") into the UMWA Combined Benefit Fund ("Combined Fund"). 26 U.S.C. § 9702(a). The Combined Fund provides benefits to coal industry retirees who, as of July 20, 1992, were eligible to receive and were receiving benefits from the 1950 or 1974 Trusts. 26 U.S.C. § 9703.

[7] *See Eastern Enterprises*, 110 F.3d at 160.

Act in a very real sense should be viewed as going back only to 1987, not 1965.

Set forth below in this Statement of the Case is a more detailed statement of the facts concerning the miners assigned to Eastern under the Coal Act; Eastern's participation in the coal industry and in the implementation of the retiree health benefit plans giving rise to the Coal Act; Eastern's creation, domination, and control of EACC; and the choices Congress rationally made to hold employers like Eastern liable for the commitments made to their employees.

1. Eastern Employed Samuel East And The Other Miners Assigned To It Under The Coal Act.

Eastern argued below that the Social Security Administration ("SSA") should not have assigned it any miners or their dependents. *Eastern Enterprises*, 110 F.3d at 154. Instead, it maintained, the miners should have been assigned to EACC, to which Eastern transferred most of the assets of its Coal Division in 1966. *Id.* Eastern's arguments in the District Court and the First Circuit Court of Appeals included an administrative challenge to the SSA's assignment to Eastern of the widow of a particular miner, Samuel East, as a test case under the Coal Act. *Id.* Although Eastern apparently has abandoned its attempt to have those premiums paid by EACC, which never employed Mr. East or any of the other miners assigned to Eastern, it remains instructive to view Eastern's participation in the plans in question and in the creation of the expectation of lifetime health benefits, from the point of view of Mr. East and his widow, Josephine.

Samuel East was born in Alabama. JA 212a. He was 29 years old, married, and living in West Virginia when he was hired by Eastern (then known as Eastern Gas & Fuel Associates) on January 2, 1934. JA 142a at ¶ 2; RA 2173 at ¶ 14. He was hired as a hand loader and cutting machine operator. *Id.*

Mr. East mined coal for Eastern for 26 years, from 1934 to 1960.[8] *Id.* He then worked for less than five years for Calvert Coal Co., formerly known as C.C. & L. Coal Co. JA 143a at ¶ 4; RA 2308 at ¶ 6. Mr. East never worked for EACC in any capacity. JA 143a at ¶ 5; RA 2173 at ¶ 14. Mr. East retired in early 1967. JA 143a at ¶ 6; RA 2308 at ¶ 6. He died in 1984. RA 23-25.

For 26 of the 31 years Mr. East worked as a miner, Eastern benefited from his labor. For many of those years, Eastern contributed to the UMWA trust funds and Mr. East and his widow received benefits from the funds.[9] Those benefits never ceased. JA 143a-144a at ¶¶ 7, 8; RA 2308 at ¶¶ 8, 9. Thus, for Mr. East and the other miners, they became lifetime health benefits. From the time of his retirement until his death, Mr. East received benefits from the UMWA funds, even though Eastern itself stopped contributing to the UMWA funds in the mid-1960s, and even though Calvert Coal Co. went out of business and ceased contributions in 1977. JA 143a at ¶¶ 4, 7; RA 2308 at ¶¶ 6, 8. Mrs. East continues to obtain benefits from the Combined Fund. JA 144a at ¶ 8; RA 2308 at ¶ 9.

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[8] The First Circuit incorrectly stated that Mr. East worked for Eastern for 14 years, but the difference is not critical to the issues on appeal. *See Eastern Enterprises*, 110 F.3d at 154.

[9] Specifically, Mr. East was a beneficiary of the UMWA Welfare and Retirement Funds ("W&R" Funds) of 1946 and 1947, and the 1950 W&R Fund from the inception of these plans. After his retirement in 1967, he continued to be a beneficiary of the 1950 W&R Fund's successor, the 1950 Benefit Plan. JA 143a at ¶ 7; RA 2308 at ¶ 8. Mrs. East was a beneficiary of the 1950 Benefit Plan on July 20, 1992, and thereafter became a beneficiary of the Combined Fund. JA 144a at ¶ 8; RA 2308 at ¶ 9.

2. The Evolution Of The Flawed Implicit Promise Of Lifetime Health Care Benefits Given By Eastern And The Other Operators.

a. Eastern and the other operators made an implicit commitment and promise of lifetime health care benefits.

Labor strife in the industry reached a breaking point in 1946 when the members of the UMWA went on a nationwide strike over health and retirement benefits. *Coal Commission Report*, JA 262a. The crisis led to the nationalization of the coal mines by President Truman, and eventually a collective-bargaining agreement establishing health and retirement benefits funded by an industry-wide royalty, based upon the amount of coal produced by each operator. *Coal Commission Report*, JA 262a. When the coal mines were returned to their owners in 1947, the UMWA and the Bituminous Coal Operators Association, Inc. ("BCOA"), which included Eastern, agreed upon the first in a series of NBCWAs, which included provisions for miner health and retirement benefits. *Coal Commission Report*, JA 263a-264a. Eastern was a signatory to the NBCWAs in effect between 1947 and 1965. Its wholly-owned and controlled subsidiary, EACC, signed the later agreements. RA 735-36, 763-64, 801-02, 862.

In the UMWA Welfare and Retirement Fund of 1947 (the "1947 W&R Fund"), a union welfare trust was established. It created "a welfare and retirement fund to make payments to miners and their dependents and survivors in cases of sickness, permanent disability, death or retirement, and other welfare purposes determined by the Trustees." *Coal Commission Report*, JA 263a. It also created a separate medical and hospital fund to be administered by trustees appointed by the UMWA. The purpose of the fund was to provide for medical, hospital, and related services for the miners and their dependents. *Coal Commission Report*, JA 263a. Thus, beginning in 1947, Mr. East was provided with health care

benefits which would be available to him even after he retired and would be provided to his family upon his death.

Over the next two years, labor strife continued as the UMWA and the coal operators wrangled over the details of this new and revolutionary change in the relationship between employer and employee. After another walkout, the coal operators, including Eastern, and the UMWA finally reached an agreement. In exchange for union acquiescence in the mechanization of the mines, the coal operators, again including Eastern, agreed in the 1950 NBCWA to establish the United Mine Workers of America Welfare and Retirement Fund of 1950 ("1950 W&R Fund"). *Coal Commission Report*, JA 265a.

> The 1950 W&R Fund was intended to provide benefits to working and unemployed miners, their spouses and dependent children under age 18, retired miners and their spouses, widows of deceased miners, and relatives of deceased miners who cared for the miners' orphaned children. The program included the payment of unlimited hospitalization and in-hospital medical care as well as disability, death, or retirement benefits. . . . The Fund was the exclusive provider of health, pension, and other welfare benefits for UMWA active and retired miners and their dependents.

Davon, Inc. v. *Shalala*, 75 F.3d 1114, 1117 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 682 (1997).

The Coal Commission found that the coal industry had at least implicitly promised its miners lifetime health care benefits which they then legitimately expected.

> Retired coal miners have legitimate expectations of health care benefits for life; that was the promise they

> received during their working lives and that is how they planned their retirement years. That commitment should be honored.

Coal Commission Report, JA 245a-246a. *See also* 138 CONG. REC. S10,783 (1992) (statement of Sen. Byrd: "[T]he purpose of the amendment . . . is a simple one . . . . It is to assure tens of thousands of retired coal miners — many of whom are in poor health, and all of whom risked their lives to provide our Nation with the energy resources that made America the great economic and industrial power that it is today — promises made to them during their working years are not now, in retirement, in their 'golden years,' going to be reneged upon"); 138 CONG. REC. S10,785 (1992) (statement of Sen. Wofford: "[C]oal miners went to work each day under the assumption that their health benefits would be there when they retired"). Senator Rockefeller, the sponsor of the Coal Act, further observed:

> Coal miners have been in the vanguard of the fight for decent health care because illness and injury have been so endemic to coal mining. For decades, the fight for good health care has been central to labor relations in the coal industry. The current health program derives from the one established when President Truman seized the mines in a 1946 strike in which health care was a central issue.

138 CONG. REC. S17,632 (1992) (statement of Sen. Rockefeller).

Significantly, the expectation of lifetime benefits was expressed by those representing the operators, as well as the miners themselves. For example, Charles A. Owen, the designated trustee of the 1950 W&R Fund, representing Eastern and the other coal operators, informed the coal

operators who were signatories to the 1950 NBCWA that the Fund provided for the following:

> Welfare activities of the Fund are comprised of Death Benefits, Pensions, Medical and Hospital Service, Rehabilitation of and Cash Aid to the Disabled, and Cash Aid to Widows and Dependent Children. . . . Benefits cover Hospitalization, Surgical and Medical Care for mine worker [sic], including pensioners and dependents *during his life, without limit as to duration*, also the furnishing of expensive drugs, oxygen, etc. to the home when specified.

Charles A. Owen, *Report dated November 5, 1951*, JA 132a-33a at ¶ 39; RA 1898-99 at ¶ 5, RA 1971-72 (emphasis added).

Similarly, in a speech given on October 8, 1953, Joseph E. Moody, the president of the Southern Coal Producers Association, acknowledged that the beneficiaries of the 1950 W&R Fund had been "promised" and had "grown accustomed" to receiving the benefits provided by the 1950 W&R Fund.

> Unwise pensions and welfare plans, set up with little thought to their actuarial soundness or the ability of an industry to pay, can only cause friction and eventual hardship, and even the economic disruption of the industry or company involved. I hesitate to speculate on what might happen if the Coal Welfare Fund again goes broke. It is certain that the mine operators, already operating at a loss, cannot increase the royalty payment. Instead, it should be lowered. But depriving some 400,000 persons of benefits they have *been promised and grown accustomed to*, could be political as well as social dynamite. . . . Perhaps

> legislation by Congress is necessary to proscribe [sic] sound restrictions under which such benefit plans can operate; but if it is, we as business men and Americans must see that such legislation is passed.

Joseph E. Moody, *Speech before the Fall Industrial Relations Conference,* October 8, 1953, Cleveland, Ohio, JA 133a at ¶ 39; RA 1899 at ¶ 6; RA 2000 (emphasis added).

Another factor that contributed to the creation of an expectation of lifetime benefits is the enormous price that the miners paid to extract the industry's commitment to health care. A major concession on the part of the UMWA in the negotiations over the 1950 NBCWA was its agreement to the coal industry's mechanization of the mines. *Holland* v. *Keenan Trucking Co.*, 102 F.3d 736, 741 (4th Cir. 1996). The significance of this sacrifice on the union's part is evidenced by the fact that almost immediately after its execution, the negative impact of mechanization on the workforce became apparent. "As a result of the shift in markets and the rapid mechanization of U.S. mines during the 1950s and 1960s, coal mine employment declined *75 percent* during this period from a high of 488,000 in 1950 to 130,000 by 1969." *Coal Commission Report*, JA 255a (emphasis added). Losing 75% of its workforce must have been a bitter pill for the union to swallow — and was a tremendous price to pay for the health care benefits it obtained.

> In the deal that created this health program in the 1940's, the miners agreed to mechanization of the mines, opening the way to the industry's prosperity. The miners knew that tens of thousands of jobs would be lost but that they would have good health care in their twilight years. The industry knew its labor costs would fall. This legislation is needed to see to it that the deal is honored. Mechanization is creating a very different economic future for the coal industry. But this legislation is needed to honor an historic promise from the past — to take care of the people who made industrial history.

138 CONG. REC. S10,783 (1992) (statement of Sen. Rockefeller).

From the vantage point of Mr. East, his health care costs were taken care of by virtue of his employment with Eastern. Mr. East could reasonably have expected to receive, and in fact did receive, health care benefits during the course of his employment, through his retirement, and until his death. While it appears that his benefits under the 1950 W&R Fund, according to its written terms, may have been revocable, the fact remains that the basic provision of lifetime health care for coal industry retirees was *never* revoked. There is no question that Mr. East in fact received lifetime benefits. Year after year, the benefits continued. Even though Mr. East's employment with Eastern was terminated in 1960 (he worked for two other companies thereafter), and even though he retired from the coal industry in 1967, Mr. East's benefits continued. JA 142a-143a at ¶ 2; RA 2173 at ¶ 14. Over the course of *forty-two years*, Mr. East, and upon his death, Mrs. East, received health benefits under the plans signed by Eastern, and the successors to those plans.

The fact that the pre-1978 NBCWAs did not contain express promises of lifetime benefits cannot erode the expectations shared by miners and their employers that developed over more than forty years. No one ever expected those benefits to be revoked, and the acknowledged danger to the industry of "political as well as social dynamite" exploding, had there ever been a revocation, made the continuation of those lifetime benefits a virtual certainty. *See* JA 133a at ¶ 39; RA 1899 at ¶ 6; RA 2000.

b. The mechanism chosen to implement the implicit commitment of Eastern and the other operators that Mr. East relied upon was flawed from the start and contributed to the financial instability of the plans.

It was not the implicit commitment of lifetime health benefits alone which Eastern and the other pre-1974 signatories made to Mr. East and the miners who worked for them which ultimately contributed to the financial instability of the plans. It was the choice Eastern and the other operators made as to the mechanism to fulfill the expectations they raised that also contributed to the instability. Eastern and the other operators chose to establish a "pay-as-you-go" system, a faulty mechanism which had repercussions for decades.[10] In the words of the First Circuit Court of Appeals:

> The crisis in retiree benefits occurred in two stages. First, the inculcation of an expectation of lifetime health benefits; and second, the inadequacy of the initial method chosen by the parties (through negotiation, albeit with government intervention) to respond to this expectation. Both elements were necessary in order to forge the problem which Congress eventually addressed.

Eastern Enterprises, 110 F.3d at 158.

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[10] Eastern contends that the industry-appointed trustee of the W&R 1947 Fund objected to the pay-as-you-go funding mechanism. *See Eastern's Brief* at 4-5, (citing *Van Horn* v. *Lewis*, 79 F. Supp. 541 (D.D.C. 1948)). It is not clear from *Van Horn*, however, what the industry trustee's specific objection was or even if it related to the pay-as-you-go system. Even if Eastern's reading of *Van Horn* were correct, the fact remains that in connection with ending a labor stoppage, the coal industry, including Eastern, agreed to having the 1947 W&R Fund administered by majority rule of three trustees, which naturally allowed the possibility that the industry-appointed trustee could be out-voted.

As articulated by the Second Circuit Court of Appeals, Eastern and the other operators chose a system with a "latent loophole." *Chateaugay*, 53 F.3d at 484. The pay-as-you-go system was not prefunded in any way to protect Mr. East and the other miners who worked for Eastern. Also, the system was premised upon a fundamentally false assumption that the number of coal operators would remain static.

> The Benefit Funds were established as multi-employer plans, again based on the common assumption that while some employers in the industry group might go out of business, other companies would emerge to take their place.

138 CONG. REC. S17,607 (1992).

History reflects that the assumptions made by Eastern and the other operators were faulty. Companies went out of business and others stopped signing the NBCWAs. *Coal Commission Report*, JA 272a-273a. As the burden on the remaining companies increased, so, too, did the number of companies dropping out. The reduction of the number of companies contributing to the plans was one of a number of significant reasons for the problems with the funds necessitating the Coal Act. *Coal Commission Report*, JA 246a. The pay-as-you-go system actually encouraged "dropouts" by allowing companies to leave the plans without any prefunding responsibility or withdrawal liability. "When a company ceased mining operations the Benefit Trusts' financing formula calculated a required contribution of zero." *Chateaugay*, 53 F.3d at 484.

The implicit commitment of lifetime health care benefits to the miners evolved over the course of more than forty years. As one of the members of the Coal Commission noted: "The basic cause of the Funds' problems today . . . is the cumulative result of the collective bargaining process over the years, as far

back as 1950, in which the BCOA has progressively made improved health care commitments to the UMWA, commitments that may have been entirely rational at the time but have now become economically unbearable." *Coal Commission Report*, JA 330a (statement of Commissioner Richard M. Holsten). In all, "[t]here is no such thing as mining coal and yet having no involvement in the crisis confronting health care financing and delivery in the coal industry." *Coal Commission Report*, JA 325a (statement of Vice Chairman Henry H. Perritt). Thus, until 1966, Eastern was among those who contributed directly to the instability of the plans by creating an expectation and giving an implicit promise of lifetime benefits, while at the same time choosing an inherently flawed system to deliver those benefits.

3. The Total Domination And Control Of EACC By Eastern And The Funneling Of EACC's Profits To Eastern From 1966 Through 1987.

After Eastern transferred assets of its Coal Division to EACC, Eastern continued as more than the owner of EACC, until 1987. It totally dominated and controlled EACC and took from EACC all of its profits. JA 145a.

In 1967, Eli Goldston, President of Eastern, and J.N. Philips and A.P. Boxey, Senior Vice Presidents of Eastern, simultaneously served as the Director and Chairman of the Board of Directors of EACC, Director and Vice Chairman of the Board of Directors of EACC, and President and Director of EACC, respectively. They were all also shareholders of Eastern. RA 297. Eastern's domination of the Chairmanship and Vice Chairmanship of the EACC Board of Directors continued up to 1987. Significantly, in the crucial year of 1978, when EACC signed the 1978 NBCWA, its President was C.A. Stefl, who was simultaneously a Senior Vice President of Eastern, and its directors were W.J. Pruyn, who

was simultaneously President and Chief Executive Officer of Eastern and R.H. Freeman, who was simultaneously the Executive Vice President and Chief Operating Officer of Eastern. RA 536-37. They were all also shareholders of Eastern. RA 535.

This domination and control also took the form of the dividends which EACC paid to Eastern from 1966 through 1987. A 1979 cash management manual indicates that while it was a wholly-owned subsidiary of Eastern, EACC was obligated to pay Eastern 100% of its net income, plus cash flow in excess of book depreciation and cost depletion. JA 145a at ¶ 16; RA 2172 at ¶¶ 8, 9; RA 2172-73 at ¶¶ 7-12; RA 2185. Eastern admits that EACC funneled to it more than $100 million in dividends between 1966 and 1987. *Eastern's Brief* at 6 n.14. In 1986 alone, EACC paid $24,162,854 to CPC, which then paid even more than that amount to Eastern. JA 145a at ¶ 16; RA 2172 at ¶ 9; RA 2188.

The dividends Eastern received from EACC dropped from $7,000,000 in 1976 to $1,500,000 in 1977, and to zero in 1978, largely due to strikes of the UMWA and others. RA 496, 504, 527. It is reasonable to infer that Eastern's President and Vice Presidents, who were also Eastern shareholders, were acting very much in Eastern's interest when they caused EACC to sign the 1978 NBCWA to resolve the UMWA strike. RA 536.

Eastern's control of EACC was so complete that it directed EACC's actions even on matters such as how its Board should vote regarding claims for monthly allowances and pension benefits of certain EACC employees. JA 145a at ¶ 16; RA 2172-73 at ¶¶ 10, 11; RA 2178-81, 2192-205.[11]

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[11] Discovery in the continuing third party indemnification claim on the merits has yielded even more evidence of Eastern's domination and control of EACC and Eastern's involvement and identification with the coal industry until 1987, as set forth in documents as public as Eastern's own Annual Reports.

Eastern itself, even aside from its total domination and control of EACC, did not cease all responsibilities and sever all ties in the coal industry in 1966. Eastern owned the Philadelphia Coke Division, which was a purchaser of coal from EACC, until October 1, 1976, when Eastern transferred the operations and net assets of that division to EACC for a demand note in the amount of $13,903,000. RA 525. In addition, Section 4(d) of the Stock Exchange Agreement between Peabody and Eastern shows that as of 1987, Eastern still maintained certain liabilities in the coal business as its "primary obligation" and agreed to indemnify Peabody with respect to the same. RA 2250-52.

Thus, contrary to its assertions, Eastern did not leave the coal industry in 1966. It remained a major force in the industry through its domination and control of EACC, it continued to profit greatly from coal mining until it sold the stock of EACC to Peabody in 1987, and it remained the primary obligor for certain coal-related liabilities even after 1987.

Furthermore, when the transfer of assets of the Coal Division took place in 1966, EACC did not assume all of the liabilities of Eastern, such as those which ultimately arose under the Coal Act. RA 2171-72 at ¶ 6. EACC certainly did not "stand in Eastern's shoes" for all purposes. Eastern itself acknowledges that EACC would not be liable for Eastern's "own prior [to 1966] conduct." *Eastern's Brief* at 48.[12] Peabody did not assume any pre-1966 liabilities of Eastern

[12] It is notable that while it transferred certain assets to EACC, Eastern apparently kept for itself all tax benefits which accrued prior to 1966, including those that related to the Coal Division. RA 289. Thus, liabilities in the nature of taxes for the pre-1966 period would obviously remain Eastern's responsibility as well, in addition to other liabilities for pre-1966 conduct. Three Circuits, the Second, Third and Fourth, have determined that the premiums under the Coal Act are in the nature of taxes. *See UMWA 1992 Benefit Plan* v. *Leckie Smokeless Coal Co.* (*In re Leckie Smokeless Coal Co.*), 99 F.3d 573, 583 (4th Cir. 1996); *Lindsey Coal Mining Co.* v. *Chater*, 90 F.3d 688, 695 (3rd Cir. 1996); *Chateaugay*, 53 F.3d at 498.

when it purchased the shares of EACC from Eastern in 1987. RA 2303-05.

4. The Coal Act And The Choices Available To Congress.

By 1990, the 1950 and 1974 UMWA Benefit Plans were facing financial disaster. *See Coal Commission Report*, JA 289a. Health care costs had skyrocketed in the 1980's, and the beneficiary population under the plans was aging. Companies were leaving the industry or ceasing their contributions to the funds, leaving fewer companies to bear the burden of the plans. They were able to do so, as noted above, in part because of the faulty choices made by Eastern and other operators in establishing the 1950 W&R Fund without prefunding or withdrawal liability. *Coal Commission Report,* JA 246a-247a. *See also Eastern Enterprises*, 110 F.3d at 158. At the same time, the lifetime retiree health care promises made to Mr. East, his widow, and the other miners who worked for Eastern and the other operators, were being kept. Since his retirement in 1967, both Mr. East, until his death in 1984, and his widow, received health care benefits under the 1950 Plan and its successors. After having worked for Eastern for 26 years and in the coal industry for a total of 31 years, of course, the Easts expected and deserved such coverage as they had been led to believe they would receive.

Both the Coal Commission in making its recommendations, and Congress, in transforming those recommendations into workable legislation, faced a number of options. First, Congress had to determine who it would target to pay into the plan: the taxpayers, the retirees (who were never considered a plausible solution in that they lacked the resources to pay), or the coal industry. *See Coal Commission Report,* JA 323a. Congress settled on the coal industry as the logical funding source.

After determining that the coal industry was the most rational choice, Congress then had to determine who within the industry it would require to fund the plan, i.e., only current coal operators, those operators who had signed the 1978 NBCWA or later agreements, or the companies that had actually employed the retired miners.[13] Initially, the Senate considered a bill which provided for an industry-wide tax on all ongoing coal operations, plus an additional "per beneficiary" premium payment obligation on each company that had signed the 1978 or any subsequent NBCWA. This bill was vetoed by the President. *See* 138 CONG. REC. S17,633 (1992). Ultimately, Congress passed the Coal Act under which coal operators and related companies are required to fund the premiums for health benefits of miners who worked for them, and to assume a proportional percentage burden for payment of premiums of orphan miners. *See Coal Commission Report,* JA 312a.[14] The product of vigorous and often contentious debate in both houses of Congress, this plan, approved by the executive branch, is the culmination of what Congress viewed as the fairest, most workable solution to the crises facing the coal industry. *See* 138 CONG. REC. S17,633 (1992). *See also* 138 CONG. REC. S10,783 (1992) (statement of Sen. Rockefeller) (the Coal Act is "rational" and "fair").

It is not clear from its brief just who Eastern believes should bear the costs of the miners' health care benefits or what choice it thinks Congress could or should have made. Eastern does not want Mrs. East to go without health care benefits or be forced, after all these years of receiving benefits,

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[13] Other options, including taxing all coal production and taxing only bituminous coal production (regardless of whether the companies had ever been signatory to the NBCWA), met opposition in the Senate and were threatened with a presidential veto. 138 CONG. REC. S17,607 (1992).

[14] "Instead of including a broad industrywide tax, the basic funding mechanism of this legislation generally requires premium payments from those for whom the retirees worked. These are the responsible companies." 138 CONG. REC. S17,633 (1992).

to pay for them herself. Likewise, Eastern apparently does not believe (and cannot seriously argue) that the general public should pay for the miners' benefits in view of the forty years of promises made to them by an industry which employed them and reaped so much in profits from their labors. Presumably, Eastern would like to have the burden placed on other, current operators in the industry, who never employed Mr. East, or the other miners assigned to Eastern and never profited from their labors (as Eastern did). That option was presented and explored. However, there were many who questioned the wisdom and justice of that arrangement, including the United States Congress which ultimately chose the more rational, logical, and equitable system, which became the Coal Act.

SUMMARY OF THE ARGUMENT

I. The Coal Act as applied to Eastern does not violate the Due Process Clause. Economic legislation applied retroactively need only be "supported by a legitimate legislative purpose furthered by rational means." *Pension Benefit Guar. Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 729 (1984). Eastern does not appear to dispute the legitimate governmental purposes underlying the Coal Act, making the relevant inquiry whether the legislative purpose of the Act is rationally furthered by the provisions requiring Eastern to bear some of the costs to remedy problems with the multiemployer benefit plans.

Requiring Eastern and other operators to contribute to remedy the plans is "a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor . . . ." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 18 (1976). Retroactive legislation need not be based on "blameworthiness" or asking only those who can be found to have caused the harm addressed to contribute to its solution. The employees for whom Eastern is being asked to

contribute have a "specific need" for health care benefits related to their employment by virtue of the concessions given up by the miners to get them, the implicit promises and commitments made to the miners, and the particular health sacrifices in the national interest, made by the miners while working for Eastern and the other operators.

Congress made an industry-specific, fact-specific finding that there was an implicit promise and commitment made by the coal operators which led them to the legitimate expectation of retiree health benefits. This caused a "detriment" to the miners because of the faulty choice made by the coal operators to effectuate the commitment. *See Connolly* v. *Pension Benefit Guar. Corp.*, 475 U.S. 211, 229 (1986) (O'Connor, J., concurring). This finding by Congress cannot be rejected unless the Court finds that it could not have reasonably been conceived to be true by Congress. *See e.g., FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 313 (1993).

Eastern's claim that it bears no liability for its miners because it created and capitalized EACC which made contributions to the plans in 1966 and thereafter, is too "crabbed" a view, not taking into account that Eastern itself and other operators made the faulty implicit promise and commitment originally, and that there were a number of causes for the problems with the plans which contributed to the crises in the 1990s.

The "unique circumstances" of the total domination and control of EACC by Eastern until the sale in 1987, and the funneling of EACC's profits to Eastern, totaling over $100 million during that time, makes it fair to view the retroactivity as dating back to 1987, rather than 1965. In any event, Eastern reaped enormous profits from the labor of the miners who worked on behalf of Eastern through EACC since 1965. Yet, in spite of this benefit, Eastern has not had to pay for the retiree health care benefits it implicitly promised,

making it rational and reasonable for Congress to ask that Eastern contribute to the payment of these benefits now.

II. The Coal Act does not constitute a Fifth Amendment taking of Eastern's property. Application of the three factors outlined by this Court in *Connolly*, namely: the economic impact; the interference, if any, with distinct investment-backed expectations; and the character of the governmental action, compels the conclusion that the Coal Act is constitutional. *See Connolly*, 475 U.S. at 224.

The assignment of miners to Eastern under the Coal Act does not constitute an invasion or appropriation of assets for government use, but mandates payments to a private fund. *See Eastern Enterprises*, 110 F.3d at 161. The analysis undertaken by the Court in upholding the constitutionality of the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§ 1381-1461 ("MPPAA") is equally applicable to the Coal Act. *See Eastern Enterprises*, 110 F.3d at 160 (citing *Connolly*, 475 U.S. at 225; *Concrete Pipe and Prods., Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602, 645 (1993)).

Eastern claims it did not expect to have to contribute to the lifetime health care benefits of miners such as Mr. East, but the issue is whether its lack of foresight was reasonable given its contribution to the reasonable expectation of lifetime health benefits of the miners and the faulty system to deliver those benefits it helped to put into place. Eastern's corporate reorganization in 1966 and the sale of the stock of EACC to Peabody in 1987 do not show that Eastern's "distinct," investment-backed expectations were upset by the Coal Act since both of those transactions were premised on Eastern remaining liable for its own pre-1966 conduct. The Coal Act did not upset those expectations because Eastern's liability under it is based solely on its pre-1966 conduct.

The amount of Eastern's Coal Act liability is very much in dispute. In any event, the amount of the liability is not

determinative of the economic impact prong. *See Concrete Pipe*, 508 U.S. at 645. There is no violation of the Takings Clause where all of the miners assigned to Eastern worked for Eastern and to the extent that Eastern may be liable for "orphan" miners, those assignments will be proportionally based upon the number of its own retirees who have been assigned to Eastern. The economic impact on Eastern is mitigated by Coal Act provisions including those which provide for the assignment of miners to certain coal operators other than Eastern, where possible, and compelled the transfer of funds from other plans to defray the cost of "orphan" miners.

Eastern argues that the Coal Act cannot be upheld unless a causal nexus is established between the harm the Act seeks to remedy and some conduct on the part of Eastern. No such standard has been articulated in cases such as this where the statute does not involve payments to the government for its own use. Even if a causal nexus standard were applicable in this case, that standard would be met by the Congressional findings that coal operators like Eastern played a role in the events that ultimately necessitated the passage of the Coal Act.

ARGUMENT

I. THE COAL ACT DOES NOT DENY EASTERN DUE PROCESS.

A. *The Constitutionality Of The Coal Act Must Be Upheld If It Has A Legitimate Legislative Purpose Furthered By Rational Means.*

Although Eastern's argument in the First Circuit edged toward seeking a heightened judicial scrutiny standard for determining the constitutionality of an act with retroactive application, *see Eastern Enterprises*, 110 F.3d at 156, Eastern now appears to concede that such a statute need only be

"supported by a legitimate legislative purpose furthered by rational means." *Gray*, 467 U.S. at 729.[15]

The *Gray* Court left little doubt that, with respect to legislation applied retroactively, there is the same presumption of constitutionality as applied prospectively which can only be overcome by establishing that Congress has acted "in an arbitrary and irrational way." *Id.* (quoting *Turner Elkhorn*, 428 U.S. at 15). The *Gray* Court held:

> [T]he strong deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied retroactively. Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches.

Id.

Eastern does not appear to dispute the legitimate governmental purposes underlying the Coal Act: (1) to remedy problems with respect to the beneficiaries of multiemployer benefit plans that provide health care benefits to coal industry retirees; (2) to allow for sufficient operating assets for such plans; and (3) to provide for the continuation of a privately financed program for the delivery of health care benefits to the beneficiaries of such programs. Pub. L. No. 102-486, 106 Stat. 2776, 3037.

Therefore, the relevant inquiry is limited to whether these legislative purposes are rationally furthered by the provisions which require Eastern to bear some of the costs to remedy problems with the multiemployer benefit plans.

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[15] *Eastern's Brief* at 22.

B. *The Due Process Clause Does Not Require That Congress Find That Eastern Caused The Harm Addressed By The Statute.*

Eastern is faced with an almost insuperable burden of showing that the means selected by Congress to further the purposes of the Coal Act cannot be deemed to be rational on any "conceivable" basis. *Heller* v. *Doe*, 509 U.S. 312, 319-21 (1993); *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 313-16 (1993). Eastern cannot raise a constitutional issue by questioning whether Congress has tailored the legislation with a "mathematical precision in the fit between justification and means." *Concrete Pipe*, 508 U.S. at 638-40. This Court has found that, "[i]t is surely proper for Congress to legislate retrospectively to ensure that costs of a program are borne by the entire class of persons that Congress rationally believes should bear them." *United States* v. *Sperry Corp.*, 493 U.S. 52, 65 (1989).

Eastern has sought to sidestep its burdens by superimposing on the rational means test an additional "causation" requirement, that Congress must meet in order for its statutes to pass constitutional muster — a requirement found nowhere in the language or the reasoning of any prior decisions of this Court. As the Fourth Circuit observed: "The Supreme Court has never held that only responsible parties may bear the burden of remedial legislation." *Holland*, 102 F.3d at 741-42 (citing *Davon*, 75 F.3d at 1125 n.9). Eastern proposes that this Court adopt the requirement that, "the only rational basis for retroactively singling out a group or individual to bear the costs of solving a problem is that the group or individual contributed to the creation of the problem." *Eastern's Brief* at 24. Contrary to Eastern's claims, the causation of harm is not, nor should it be, the standard for testing whether Congress has adopted a rational means of accomplishing a legitimate legislative purpose.

> Such a rule would hamper Congress' ability to address problems in areas where it is difficult to find a precise "cause," and would threaten Congress' ability to impose remedial burdens on the public at large, which rarely can be identified as the direct cause of the specific ills addressed by a given piece of economic legislation. Thus, legislation need not place remedial burdens on the "most responsible" party to survive rational basis scrutiny. The legislative means need only be reasonably related to some legitimate governmental end.

Holland, 102 F.3d at 741-42.

Eastern relies upon the Court's decision in *Turner Elkhorn*, 428 U.S. 1 (1976), as support for its proposition that the Court adopt this new standard (which Congress met in any event when it rationally found that Eastern contributed to the problems of the funds which the Coal Act seeks to remediate). That reliance is misplaced. In *Turner Elkhorn*, the Court explicitly stated that its approval of the retrospective imposition of liability was not based "on any theory of deterrence . . . or *blameworthiness* . . ." *Id.* at 17-18 (emphasis added).

The constitutionality of certain provisions of the Black Lung Act[16] in *Turner Elkhorn* was not based on a finding that the operators were at fault and could be held liable for causing the miners to suffer from the disease. *Id.* Rather, the Court determined that the employment relationship and profit earned from the miners' labors, while the disease festered, provided a sufficiently rational relationship. *Id.* The Court described the legislation as a "rational measure to spread the costs of the employees' disabilities to those who have profited from the

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[16] Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1972, 86 Stat. 150, 30 U.S.C. §§ 901 *et seq.* ("Black Lung Act").

fruits of their labor, the operators and the coal consumers." *Id.* at 18. In the present case, the retirees (like Mr. East) worked in those same unhealthy coal mines, earning profits for coal companies (like Eastern), while the coal industry, including Eastern, implemented a benefit plan that was not sufficiently funded to provide lifetime health benefits for the miners and their dependents. It was well within Congress' power to decide that the Coal Act, like the Black Lung Act addressed in *Turner Elkhorn*, was a rational measure to spread the costs of contributing to the health care plans to those "who have profited from the fruits of their labor," without regard to "blameworthiness." *See id.*

In upholding the retrospective application of the Black Lung Act in *Turner Elkhorn*, the Court also noted that the law "serve[d] to spread costs in a rational manner by allocating to the operator an actual cost of his business, the avoidance of which might be thought to have enlarged the operators' profits." *Turner Elkhorn*, 428 U.S. at 24-25. The Court's reference to an actual cost of the business was not to the money that might have been used to prevent exposure to the coal dust which caused the black lung disease. Rather, the Court apparently was referring to "excess profits" that resulted from not having to set aside earnings "from current operations sufficient to provide compensation." *Turner Elkhorn*, 428 U.S. at 42 (Powell, J. concurring). This case provides a striking parallel in that Eastern and the other pre-1974 signatories reaped "excess profits" through their failure to set aside sufficient funds from operating profits to prefund the 1950 Plan.

Eastern has further sought to distinguish *Turner Elkhorn* on the grounds that the needs addressed under the Coal Act were not "specific," like those covered by the Black Lung Act, but more "generalized" and unrelated to the work performed by

the miners for Eastern.[17] However, the purpose of the Coal Act, to remedy problems with respect to the beneficiaries of the benefit plans in the coal industry, did relate to a "specific need" of the miners, by virtue of the very specific and central focus on health care benefits which existed in the industry negotiations leading to significant concessions by the miners; the forty-year evolution of the health care benefits involving the government, union and operators; the implicit commitment made to the miners by the operators and the plans; and the particular health sacrifices made by the miners in the national interest. "The Funds today represent the end result of over 40 years of historic evolution and efforts by the parties to fit a medical care system into a changing economic and labor relations environment." *Coal Commission Report*, JA 259a. Such a history relates to a "specific" need, not a "generalized" one.

C. *Congress Found That The Pre-1974 Employers Had Implicitly Promised Lifetime Health Benefits To The Miners.*

In addition to the profits garnered from the labor of these miners, Congress found that the pre-1974 signatory operators implicitly committed to, and created the expectation of, lifetime health care benefits for the miners who worked for them.

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[17] The "specific need" addressed by the Black Lung Act was the precise means through which the Court in *Turner Elkhorn* distinguished *Railroad Retirement Board* v. *Alton R.R.*, 295 U.S. 330 (1935). The *Turner Elkhorn* Court found that, in *Alton*, the purpose of the Railroad Retirement Act of 1934 was, in contrast to the Black Lung Act, too generalized to be held constitutional on due process grounds. Parenthetically, the Court in *Turner Elkhorn* also questioned the continuing "vitality" of *Alton*. *Turner Elkhorn*, 428 U.S. at 19; *see also Eastern Enterprises*, 110 F.3d at 158-59 ("*Alton* belongs to an earlier, now discredited doctrinal era, and it is no longer good law").

> Congress found that all employers who were signatories to wage coal agreements . . . created an expectation of lifetime benefits, and it determined that the fairest means to fund these liabilities was through premiums allocated among these operators.

Lindsey Coal Mining Co. v. *Chater*, 90 F.3d 688, 694 (3d Cir. 1996) (citing 138 CONG. REC. S17,603 (1992) (conference committee report)). *See also Holland*, 102 F.3d at 741; *Blue Diamond Coal Co.* v. *Secretary of Health and Human Services* (*In re Blue Diamond Coal Co.*), 79 F.3d 516, 522 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 682 (1997). "Congress found that the promise was implicit and, of course, Congress does not have to be correct in its beliefs — just reasonable." *Lindsey*, 90 F.3d at 694.

In enacting the Coal Act, Congress relied on the well researched findings of the Coal Commission. Congress also relied on its own investigations which amounted to two years of further study and deliberation.[18] *Chateaugay*, 53 F.3d at 484.

After reviewing the historical evidence, both Congress and the Coal Commission concluded that pre-1974 signatories like Eastern had, in fact, made an implicit commitment to provide miners with health benefits thereby creating a legitimate expectation of lifetime benefits. *Eastern Enterprises*, 110 F.3d

[18] After the Coal Commission issued its report, Congress commenced hearings to consider its findings and recommendations. *See Coal Commission Report on Health Benefits of Retired Coal Miners: Hearing Before the Subcomm. On Medicare and Long-Term Care of the Senate Finance Comm.*, 102d Cong., 1st Sess. (1991) ("Senate Hearings"). In October 1992, Congress passed the Coal Act as part of the Energy Policy Act of 1992 with the following stated purposes: "[T]o remedy problems with the provision and funding of health care benefits with respect to the beneficiaries of multiemployer benefits plans that provide health care benefits to retirees of the coal industry . . . [and] to provide for the continuation of a privately financed self-sufficient program for the delivery of health care benefits to the beneficiaries of such plans." Pub. L. No. 102-486, § 19142(b).

at 157; *Lindsey*, 90 F.3d at 694; *Blue Diamond*, 79 F.3d at 522; *Davon*, 75 F.3d at 1124-25.

The expectation of lifetime benefits was expressed not only by the miners, but by those representing the operators as well. For example, Charles A. Owen, the designated trustee of the 1950 W&R Fund, representing Eastern and the other coal operators, informed the signatories to the 1950 NBCWA that the Fund provided health benefits "for mine worker [sic], including pensioners and dependents *during his life, without limit as to duration* . . . ." Charles A. Owen, *Report dated November 5, 1951*, JA 132a-133a at ¶ 39, RA 1898-99 at ¶ 5, 1972 (emphasis added). Joseph E. Moody, the president of the Southern Coal Producers Association, acknowledged that the beneficiaries of the 1950 W&R Fund had been "promised" and had "grown accustomed" to receiving the benefits provided by the 1950 W&R Fund. Joseph E. Moody, *Speech before the Fall Industrial Relations Conference,* October 8, 1953, Cleveland, Ohio, JA 133a at ¶ 39; RA 1899 at ¶ 6; RA 2000.

The expectation of lifetime benefits was also bolstered during the negotiations of the 1950 NBCWA. The industry made a commitment to health care premised in part on the UMWA's acquiescence to the mechanization of the mines.[19]

[19] Eastern challenges this historical fact by citing to facts presented in two other cases involving the UMWA and a biography of John L. Lewis. However, Eastern is engaging in revisionist history. In *United Mine Workers of America* v. *Pennington*, 381 U.S. 657 (1965), Eastern claims that Justice Goldberg, in his concurrence, stated that UMWA acquiescence in the mechanization of the mines was an "articulated policy of the Union since 1933." *Id.* at 698. Justice Goldberg, however, did not make this statement. The "articulated policy" the Justice was referring to involved the UMWA's "philosophy" of seeking "uniform high wages, fringe benefits, and good working conditions" for its miners. *Id.* In fact, Justice Goldberg acknowledged that "[a]s the quid pro quo for [these long articulated goals], the Union is willing to accept the burdens and consequences of automation." *Id.* This reading of the facts is consistent with this Court's presentation of the facts in the same case wherein the Court stated that as a result of the 1950 wage agreement and its amendments, and the "additional understandings" entered into between the Union and the large operators, "the union . . . agreed not to oppose the rapid mechanization of the mines which would substantially reduce

Holland, 102 F.3d at 741. The enormity of the UMWA's concession is evidenced by the fact that almost immediately after the execution of the NBCWA, the negative impact of the mechanization on the workforce became apparent. "As a result of the shift in markets and the rapid mechanization of U.S. mines during the 1950s and 1960s, coal mine employment declined *75 percent* during this period from a high of 488,000 in 1950 to 130,000 by 1969." *Coal Commission Report*, JA 255a (emphasis added). Senator Rockefeller acknowledged the union's sacrifice:

> In the deal that created this health program in the 1940's, the miners agreed to mechanization of the mines, opening the way to the industry's prosperity. The miners knew that tens of thousands of jobs would be lost but that they would have good health care in their twilight years. . . . [T]his legislation is needed to honor an historic promise from the past — to take care of the people who made industrial history.

138 CONG. REC. S10,783 (1992).

Clearly, in this context, it is not unreasonable to conclude that miners, like Mr. East, fully expected that the coal operators' commitment to health care would be honored. In fact, time proved that it was, as miners like Mr. East and their beneficiaries received health care benefits throughout their lives. In this light, it is most reasonable to conclude, as did the Coal Commission and Congress, that an expectation of lifetime benefits, dating back to the 1940's, was created through the acts of the coal industry, including Eastern.[20]

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mine employment, [and] agreed to help finance such mechanization . . . ." *Id.* at 660.

[20] Eastern denies that it made any promise of lifetime health care benefits and points out the absence of any express promise in the NBCWAs that it signed. Eastern's argument that it never explicitly and contractually promised its employees lifetime benefits is not dispositive. Congress' power to regulate is not limited by the terms of private contracts. *Connolly*, 475 U.S. at 223-24. "'Contracts, however express, cannot fetter the constitutional authority of Congress. . . .' If the regulatory statute is otherwise within the powers of Congress, therefore, its application may not be defeated by private contractual provisions." *Id.* at 224 (quoting *Norman* v. *Baltimore & Ohio R.R.*, 294 U.S. 240, 307-08 (1935)). Moreover, "a contractual promise of lifetime benefits is not a 'prerequisite' of a congressional finding that a party bears some responsibility for the expectations created by its past conduct." *Blue Diamond*, 79 F.3d at 523 (citing *Davon*, 75 F.3d at 1125-26).

The First Circuit concluded that since Eastern contributed to the creation of this expectation, "requiring it to pay for the realization of those expectations is hardly irrational." *Eastern Enterprises*, 110 F.3d at 157. As the First Circuit observed, Mr. East was in Eastern's employ long enough to develop a reasonable expectation of lifetime health benefits. "In contrast, he never worked for EACC, yet Eastern's alternative would have that company assume responsibility for him. Requiring Eastern to pick up the tab strikes us as a less arbitrary step." *Id.* at 158 n.5.

There was a direct connection between the promise of lifetime health benefits and a significant detriment to the miners. As a result, this case is not the type that Justice O'Connor expressed concern about in her concurring opinion in *Connolly*, 475 U.S. 211. Justice O'Connor noted: "Our recent cases leave open the possibility that the imposition of retroactive liability on employers for the benefit of employees may be arbitrary and irrational in the absence of any connection between the employer's conduct and some detriment to the employee." *Id.* at 229. Congress found that very connection. It determined that the coal operators had implicitly promised and committed to the miners that they would have lifetime health benefits in retirement. *Coal Commission Report*, JA 245a-246a. The detriment to the miners was that they continued to labor in the mines based on that commitment, but the program put in place to see it through was a faulty one which ultimately needed to be remedied by the Coal

Act. Another detriment to the miners was the allowance of the mechanization of the mines. *Coal Commission Report*, JA 265a. Congress found an industry-specific, fact-specific connection. It would be revolutionary indeed, for the Court to find that this very specific finding and connection made by Congress between the conduct of the employers and the detriment to the employees which the statute seeks to address, was irrational. *See* n.2, *supra*.

D. *Congress' Finding Of An Implicit Promise Of Lifetime Benefits Cannot Be Rejected By The Court Unless It Could Not Have Been Reasonably Conceived To Be True By Congress.*

Eastern argues that "nothing in Eastern's conduct could have led miners to develop a reasonable expectation of lifetime retiree health benefits that would be paid by Eastern." *Eastern's Brief* at 28. As support, Eastern looks to Justice O'Connor's concurrence in *Connolly* which states that employee expectations "in the face of plain language to the contrary, are not easily traceable to the employer's conduct." *Id.* (quoting *Connolly*, 475 U.S. at 235). Eastern's reliance on Justice O'Connor's statements, however, is misplaced. While *Connolly* dealt with a legislative scheme which relates to the economy generally, the coal industry has a very particular history that was examined closely by Congress. As a result of this examination, Congress determined that there was an implicit commitment to lifetime benefits made by pre-1974 signatories, as discussed *supra* in Section I-C.

Eastern also claims that a finding that there was such an implicit promise was a "rewrite" of history and a "fiction" which the Court need not accept. *Eastern's Brief* at 30-31. Eastern is impermissibly asking the Court to re-examine the record and make its own decision as to whether the implicit commitment was or was not made. Eastern, at bottom, is

asking this Court to reject the Congressional findings and adopt what Eastern believes is a far better or wiser view of history. But Eastern, as the party "challenging the legislative judgment must convince the [C]ourt that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decision maker." *Vance* v. *Bradley*, 440 U.S. 93, 111 (1979). This is a hurdle that is too high for Eastern to overcome no matter how much it differs with Congress' view of the historical record.

The applicable standard here is the one articulated in *Beach Communications*, 508 U.S. 307 (1993): Economic legislative choices, like those involved in the enactment of the Coal Act, are "not subject to courtroom fact finding and may be based on rational speculation unsupported by evidence or empirical data," *id.* at 315, although Congress did have such evidence and data, in any event, to support the passage of the Coal Act.[21]

Neither *Sable Communications, Inc.* v. *FCC*, 492 U.S. 115 (1989), nor *United States* v. *Carolene Prods. Co.*, 304 U.S. 144 (1938) supports Eastern's position. Eastern relies on *Carolene* for the proposition that "the constitutionality of a statute predicated upon the existence of a particular set of facts may be challenged by showing to the court that those facts

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[21] In *Beach Communications* this Court was asked to determine whether the statutory distinction, under the Cable Communications Policy Act of 1984 (the "Cable Act"), between cable facilities that serve separately owned and managed buildings and those that serve one or more buildings under common control or management, was in violation of the Due Process Clause of the Fifth Amendment. *Id.* at 309. The Cable Act prohibits any person from operating a cable system without a franchise except those that serve commonly controlled or managed buildings. 47 U.S.C. § 522(7). Thus, similar to the Coal Act, it imposes "costs of franchising and economic regulation" on one group over another. *Beach Communications*, 508 U.S. at 321 (Stevens, J., concurring). In upholding the constitutionality of the act, this Court emphasized that even the absence of "legislative facts" supporting the rational basis would not make the statute unconstitutional if "rational speculation" existed. *Beach Communications*, 508 U.S. at 315.

have ceased to exist." *Eastern's Brief* at 31 (quoting *Carolene*, 304 U.S. at 153). However, this proposition is not relevant here as the factual issues are those of the past, not current ones which have changed. *Sable Communications* is similarly unhelpful to Eastern. *Sable* is a strict scrutiny case in which the Court reviewed the record in order to determine whether Congress, in drafting the legislation at issue, properly imposed the least burdensome restrictions on the petitioner's free speech.[22] *Sable* was not a case in which the Court determined whether the finding of Congress could not reasonably be conceived to be true.

E. *Eastern's Creation Of EACC Cannot Shield It From Its Own Conduct Which Contributed To The Financial Instability Of The Plans.*

Eastern insists that it did not engage in any conduct which contributed to the instability of the funds because EACC, its fully capitalized subsidiary, made all the contributions to the plans Eastern would have made had it remained in the business. *Eastern's Brief* at 28-29. Hence, Eastern maintains it was not responsible for the crisis which resulted from companies withdrawing from the plans and "dumping" their responsibilities onto other companies that have kept their commitment. *Id.*

This view of the crisis and its causes is a snapshot in time from a particular vantage point. Congress was not bound to such a narrow and restricted viewpoint, so long as its findings were rational. *Heller*, 509 U.S. at 319-21. As noted above in Section 2-b of the Statement of the Case, the conduct of coal operators, including Eastern, prior to 1966 laid the foundation

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[22] *Sable Communications* involved a challenge to the constitutionality of the Communications Act of 1934 on First Amendment grounds. The applicable constitutional standard in that case was whether the statute was narrowly tailored to serve a legitimate interest (i.e., strict scrutiny). *Id.* at 125.

for companies to leave the industry in later years. Eastern and the other pre-1974 operators chose a system with no prefunding and no withdrawal liability for companies which ceased contributing to the funds as the means of providing the lifetime retiree health care they were implicitly promising to their employees. Eastern cannot reasonably ignore the history of the commitment to the miners and only look at the most recent years. As stated by the First Circuit, that view is too "crabbed" and "it is disingenuous for Eastern to focus solely on its lack of involvement in more recent benefit plans while ignoring its role in the events leading to their establishment." *Eastern Enterprises*, 110 F.3d at 158.

Furthermore, Congress found that the departure of coal companies from the coal industry was one of a number of factors which contributed to the crises of the 1990's. The legislative history of the Coal Act establishes that the roots of the crises can be traced back to the 1940's, and include a number of factors in addition to the number of companies ceasing to contribute to the funds.

> The history of the two financially troubled health care trust funds can be traced back to [the] historic 1946 agreement between the mine workers and the U.S. Government. . . . The world and the coal industry and health care in America have changed in many ways since then. Skyrocketing health care costs and a crazy quilt of court decisions on company liability have badly eroded the financial condition of the retired coal miner trust funds.

138 CONG. REC. S10,782-83 (1992) (statement of Sen. Rockefeller).[23] Still another factor which exacerbated the problem was simply the aging of the beneficiary population. *See Holland*, 102 F.3d at 738. "Many of these retirees were born in the early decades of this century. Their active days in the mines were in the 1930's and 1940's and 1950's." 138 CONG. REC. S10,783 (1992) (statement of Sen. Rockefeller).

F. *Eastern's Claim Of Unprecedented Arbitrariness As Applied To It Is Undercut By Its Total Domination And Control Of EACC.*

Eastern argues that its "unique circumstances" point to the "problems of unfairness" which would compel a finding that the Coal Act is unconstitutional as applied to it. To the contrary, the "unique circumstances" of Eastern show why it is more than fair that Eastern, in particular, be required to share in the cost of health care for the retired miners and their dependents assigned to it under the Coal Act.

Eastern points to its restructuring in 1966 and sale of the stock of EACC in 1987 to Peabody based on a price which "reflected the reasonable assumption that EACC would fulfill its own obligations, including those to the Benefit Plan," as demonstrating the unfairness of the statute and its retroactive effect. *Eastern's Brief* at 34-35.

As discussed above in Section 3 of the Statement of the Case, the installation of Eastern's officers to serve simultaneously as the President and directors of EACC; the funneling of EACC's net profits to Eastern totaling over $100 million; and

[23] Notably, Eastern states that "the crisis resulted from 'the practice in which existing companies dump[ed] their responsibilities onto companies that have faithfully kept their commitments.'" *Eastern's Brief* at 28 (quoting 138 CONG. REC. S10,783 (1992) (statement of Sen. Rockefeller)). However, Eastern misconstrued the remark. The Senator never said that the withdrawal from the industry was the *sole* cause of the crisis.

the other manifestations of the total domination and control of EACC by Eastern until the sale in 1987 along with Eastern's other ties to the industry during these years, make it more fair to view the retroactivity of this case as going back to 1987 rather than to 1965. As to the price paid by Peabody, as discussed *infra* in Section II-B-2, it reflected a very careful analysis of EACC's obligations, all of which have been fulfilled by EACC. There has been a very significant assignment of miners to EACC under the Coal Act, including many who worked for Eastern for a significant period of time. JA 144a at ¶¶ 9, 10; RA 2119 at ¶¶ 3-6.[24] What EACC did not do, at any time, was to assume any obligations of Eastern under the Coal Act for the miners who worked for Eastern and never worked for EACC. JA 144a at ¶¶ 9, 10; RA 2119 at ¶¶ 3-6. Eastern employed these miners and reaped enormous profits from their labors. It has had these profits since 1965 and presumably has made good use of them. But, it has not had to pay since then for retiree health care benefits for the miners to whom it implicitly promised such benefits. It is both rational and reasonable to ask that Eastern contribute to the payment for these benefits now.

II. EASTERN'S ASSESSED LIABILITY UNDER THE COAL ACT DOES NOT CONSTITUTE A TAKING IN VIOLATION OF THE FIFTH AMENDMENT.

As this Court has stated, if an economic regulation does not violate the Due Process Clause, it would be "surprising indeed" if it violated the Takings Clause.[25] *Concrete Pipe*, 508 U.S. at 642; *Connolly*, 475 U.S. at 223. The First Circuit and indeed all of the appellate courts that have addressed the issue

[24] The Social Security Administration, as of October 1, 1994, assigned 1,860 beneficiaries to EACC. *Id.*

[25] "[N]or shall private property be taken for public use, without just compensation." U.S. Const., Am. 5.

correctly determined that "[t]here are no such surprises here" and that the statute comports with the requirements of both substantive due process and the Takings Clause. *Eastern Enterprises*, 110 F.3d at 159-61. *See also Lindsey*, 90 F.3d at 695; *Blue Diamond*, 79 F.3d at 524-26; *Davon*, 75 F.3d at 1127-30; *Chateaugay*, 53 F.3d at 496; *Barrick Gold Exploration, Inc.* v. *Hudson*, 47 F.3d 832, 838-39 (6th Cir. 1995).

In applying the Takings Clause, this Court has "eschewed the development of any set formula" and has "relied instead on ad hoc, factual inquiries into the circumstances of each particular case." *Connolly*, 475 U.S. at 224. However, three factors are of particular significance in ascertaining the existence of a compensable taking: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation interferes with distinct investment-backed expectations; and (3) the character of the government action. *Id.* Examined in light of these factors, the regulatory scheme of the Coal Act does not impermissibly confiscate Eastern's property. *See Eastern Enterprises*, 110 F.3d at 159-61; *Lindsey*, 90 F.3d at 695; *Blue Diamond*, 79 F.3d at 524-26; *Davon*, 75 F.3d at 1127-30; *Chateaugay*, 53 F.3d at 496; *Barrick Gold*, 47 F.3d at 838-39. Each and every Circuit to review this issue has concluded that the Coal Act is a classic example of economic legislation that does not constitute a taking in violation of the Fifth Amendment. *Id.*

A. *The Character Of The Governmental Action Supports The Constitutionality Of The Coal Act.*

With respect to the character of the governmental action, the Coal Act's assignment of liability does not have the trappings of a typical Takings Clause case. *See Concrete Pipe*, 508 U.S. at 643-44; *Connolly*, 475 U.S. at 225. It does not involve real property, restrictive land use, or even a diminu-

tion in value of property. Moreover, under the Act the Government does not physically invade or permanently appropriate any of Eastern's assets for its own use. *Id.*; *Lindsey*, 90 F.3d at 695; *Blue Diamond*, 79 F.3d at 526; *Davon*, 75 F.3d at 1129; *Chateaugay*, 53 F.3d at 496; *Barrick Gold*, 47 F.3d at 838-39. "[A] taking is more readily found when the government 'physically invade[s] or permanently appropriate[s]' assets for its own use than when the claimed deprivation merely 'arises from a public program that adjusts the benefits and burdens of economic life to promote the common good.'" *Eastern Enterprises*, 110 F.3d at 161 (quoting *Connolly*, 475 U.S. at 225). As the Third Circuit found in *Lindsey*, the Coal Act is an economic regulation that adjusts the benefits and burdens of economic life and is essentially a tax to continue a benefits program. *Lindsey*, 90 F.3d at 695.

The Coal Act contains characteristics significantly comparable to other economic legislation that has already withstood scrutiny under the Takings Clause. *See Concrete Pipe*, 508 U.S. at 641-47; *Connolly*, 475 U.S. at 221-28; *Turner Elkhorn*, 428 U.S. at 17-18. In *Connolly*, this Court held, with respect to the MPPAA, that because "the Government does not physically invade or permanently appropriate any of the employer's assets for its own use" the statute does not violate the Takings Clause. *Connolly*, 475 U.S. at 224. There the employer had been a signatory to a pension plan trust agreement providing essentially that the employer's obligation for pension benefits terminated when the employer made a specified contribution to the trust. *Id.* at 218 and n.2. The employer made the specified contribution and withdrew from the plan, but the MPPAA imposed additional payment obligations beyond what the employer had agreed to pay. *Id.* Nevertheless, there was no taking because:

> [T]he United States has taken nothing for its own use, and only has nullified a contractual provision limiting liability by imposing an additional obligation that is otherwise within the power of Congress to impose. That the statutory withdrawal liability will operate in this manner and will redound to the benefit of pension trusts does not justify a holding that the provision violates the Takings Clause and is invalid on its face.

Connolly, 475 U.S. at 224-25. This conclusion regarding the MPPAA was later reiterated in *Concrete Pipe*, where this Court expressly rejected the petitioner's contention that the proper framework for judging whether the MPPAA effected a taking was that applied in cases involving appropriations of real property. *Concrete Pipe*, 508 U.S. at 543-44 (citing *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 130-31 (1978)).

Coal Act premiums are paid to a private benefit fund, not to a government entity.[26] *See Connolly*, 475 U.S. at 224-25. They are intended not for the government's own use, but to provide and protect health care benefits for UMWA retirees and their dependents. *Id.* The Coal Act seeks to restore financial stability and viability to multiemployer benefit plans by holding Eastern and other coal operators, who contributed to the crisis in the funds and who directly benefited from the labors of Mr. East and other miners, accountable for premiums. *See Chateaugay*, 53 F.3d at 496.

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[26] "The two UMWA funds created by the Coal Act are unique in being private plans included in the Federal budget." RA 1817. The First Circuit also recognized that the Combined Fund was a private plan. *Eastern Enterprises*, 110 F.3d at 161 ("[T]he funds collected are paid to a private benefit fund, not to a government entity").

B. *The Coal Act Does Not Unreasonably Interfere With Eastern's Investment Backed Expectations.*

The second element of the *Connolly* analysis requires a consideration of the extent to which the regulation interferes with reasonable, "distinct, investment-backed expectations." *Connolly*, 475 U.S. at 225-27.

Eastern claims that it did not consider or expect in 1965 or in 1987, that it would be required to contribute to the lifetime retiree benefits of the miners. However, Eastern's claim of lack of foresight is not the issue. It is whether Eastern's expectation that it would never have to make any further contributions for the lifetime health benefits of miners such as Mr. East and his dependents was "reasonable." *See Blue Diamond*, 79 F.3d at 525-26; *Davon*, 75 F.3d at 1128-29; *Chateaugay*, 53 F.3d at 495-96.

The First Circuit found that in the context of the intense federal interventions in the coal industry, which were often triggered by the issue of health benefits for miners, Eastern, having contributed to the expectation of lifetime benefits for miners, had reason to anticipate that it might be called upon to bear some of the burden that this expectation engendered. *Eastern Enterprises*, 110 F.3d at 161. Indeed, as shown above, this expectation engendered in miners like Mr. East and others, was no abstract assumption. Having employed Mr. East for 26 years by 1965, and profited from his labor on the implicit, but very concrete, basis that the coal operators would pay lifetime health benefits for him and his family, it was indeed unreasonable for Eastern to expect that the government would never require it to bear any further responsibility to contribute to his lifetime benefits if the funding mechanisms which Eastern had helped to put in place were not sufficient. *See id.*

1. Eastern's expectations in 1965

Eastern's claim is that by creating and capitalizing EACC, it did not expect that it would thereafter bear liabilities in the coal industry "*not related to its own prior conduct.*" *Eastern's Brief* at 48 (emphasis added). Assuming *arguendo* that this was its expectation, it is not one which was upset by the Coal Act. The Coal Act is structured so that a miner who worked for EACC for even a day would be assigned to EACC, even if he had worked for Eastern for many years previously.[27] Under the Coal Act, Eastern is liable for a miner only if the miner worked for Eastern prior to the transfer of assets to EACC. Eastern is liable under the Coal Act only for pre-1966 conduct — or, in its own words, "its own prior conduct." *See Eastern's Brief* at 48.

Therefore, the "distinct" investment-backed expectations of Eastern in the EACC spin-off were for EACC to be liable for conduct in the coal industry in 1966 and thereafter, and for Eastern to remain liable for its conduct prior thereto. Eastern cannot claim that it would have conducted itself differently with respect to EACC while it owned and dominated and controlled EACC based upon its expectations, since it apparently took all of EACC's profits in any event — profits of over $100 million (which are in excess of even Eastern's claimed liability under the Coal Act, which Respondents believe to be inflated). Assuming Eastern's own premise that the EACC reorganization was based on Eastern remaining liable for its own pre-1966 conduct, Eastern's quarrel is not actually that the Coal Act upset its expectations involved in that transaction, but that Congress never should have decided in the first place to extend responsibility under the Coal Act to its pre-1966 conduct.

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[27] This is so under the three-tier approach of 26 U.S.C. § 9706(a), since EACC was a signatory to the 1978 NBCWA and Eastern was not.

Eastern's claim that EACC took over responsibility under the Black Lung Act in the 1970s and thereafter for employees who worked for Eastern but not EACC rings hollow as to proof of the nature and intent of the parties' actions in 1966. As shown above, EACC was so totally dominated and controlled by EACC that EACC's conduct to benefit Eastern with respect to the Black Lung Act cannot be considered as proof of anything, except such domination and control.

2. Eastern's expectations in 1987

The 1987 sale of EACC stock to Peabody confirms that Eastern's investment-backed expectations were that it was to remain responsible for its own pre-1966 conduct and that its only expectation was to "shed" liabilities which arose from the conduct of EACC in 1966 and thereafter. Eastern argues that it "surely could not have expected that it would have any share of EACC's liability after transferring all of EACC's stock to Peabody in 1987." *Eastern's Brief* at 49. Again, the investment-backed expectation in question was that EACC and, indirectly, its new owner, Peabody, would bear the burden for all of EACC's liability — the liability for conduct occurring in 1966 and thereafter, and not for Eastern's pre-1966 "prior" conduct. The "distinct" investment-backed expectation in that transaction was very clearly set forth and explicitly limited to the liabilities of EACC and not to any liabilities of Eastern. This was especially so with respect to responsibility under benefit and pension plans.

The Stock Exchange Agreement is explicit as to the liabilities of Eastern for which CPC and EACC were liable. RA 2250-86. It expressly states that "CPC, EACC or the other Subsidiaries of CPC shall be liable, in respect of the class of individuals hereinafter specified, for payments of premiums and benefits, and for the reimbursement of benefit costs, under the plans listed on Schedule 5(c) hereto." RA 2260. The class

of individuals specified consisted of persons who had "retired or otherwise ceased to be employed by CPC or any of its Subsidiaries" (including EACC). RA 2116 at ¶ 22. This class of individuals did not include Eastern retirees who had never worked for CPC or EACC. Schedule 5(c) also makes reference only to a "Benefit Plan for UMWA Represented Employees of EACC and Subs" — not for Eastern employees who had never worked for EACC. *See* Schedule 5(c) to the Stock Exchange Agreement, JA 210a; RA 2298.

The 1987 Stock Exchange Agreement was based on a very careful analysis of EACC's liabilities as set forth in the agreement and was not based on any pre-1966 conduct of Eastern. JA 210a. In particular, that agreement did not contemplate that EACC was assuming any liabilities of Eastern for employees who never worked for EACC. JA 198a-210a; RA 2303-04 at ¶ 3. Again, Eastern's expectations that it would not be liable for any conduct of EACC in 1966 and thereafter were not upset. It is the Coal Act's placement of responsibility for Eastern's pre-1966 conduct on Eastern, which was not part of the 1987 transaction, about which Eastern complains.[28]

C. *The Economic Impact Of The Coal Act On Eastern Does Not Render It A Taking.*

Eastern's claim that its liability under the Coal Act amounts to $100 million is vigorously contested as being inflated.[29] In any event, the amount of the liability is not determinative of the economic impact prong. *See Concrete Pipe*, 508 U.S. at 645. "Our cases have long established that mere diminution in

[28] Eastern's speculation in footnote 57 of its brief as to what would have happened if it had "pushed up" the non-coal operations to a newly formed parental entity is just that, speculation, which assumes, without foundation, that the agreement between the parties would have remained the same despite a fundamental change hypothesized by Eastern. *See Eastern's Brief* at 48 n.57.

[29] *See Eastern Enterprises*, 110 F.3d at 160.

the value of property, however serious, is insufficient to demonstrate a taking." *Id.* Moreover, Eastern has never claimed that it would be unable to pay the premiums, or even that paying them would have a disastrous effect on the company, as other companies have claimed.[30]

"[T]he proper inquiry under the economic impact prong of the takings inquiry in a multiemployer benefit plan context is whether the plaintiff's liability is proportionate to the plaintiff's experience with the fund at issue." *Blue Diamond*, 79 F.3d at 525 (citing *Connolly*, 475 U.S. at 225). The assessment of premium liability under the Coal Act, like that of withdrawal liability upheld under the MPPAA, is "not made in a vacuum" and "directly depends on the relationship between the employer and the plan to which it made contributions." *Id.*

Those guidelines applied to this case compel the conclusion that Eastern is not the victim of an unconstitutional taking. Eastern is at least in part responsible for the adoption of a flawed mechanism of funding the UMWA plans that contributed to the severe financial crises which necessitated the Coal Act. *See Eastern Enterprises*, 110 F.3d at 158. In addition, Eastern's assessed premium liability depends directly on the relationship between Eastern and its former employees. Under the Coal Act, Eastern has been assigned miners who actually worked for Eastern and a proportionate number of "orphan" miners.

[30] Eastern's Chairman and CEO testified before the House of Representatives as follows: "Many of the stories being related to the Subcommittee today tell of family firms and small companies being bankrupted by the Coal Act. Many of the stories involve hardship and distress. That is not Eastern's tale. We are, fortunately, a healthy company." *Coal Industry Retiree Health Benefit Act of 1992: Hearing Before the Subcomm. on Oversight of the House Comm. On Ways and Means, 104th Cong., 2nd Sess. (June 22, 1995) (statement of J. Atwood Ives, Chairman and CEO, Eastern Enterprises).*

As the First Circuit stated,

> [T]he scheme saddles a former employer, like Eastern, with liability only for those individuals whom it employed for a relevant (and relatively long) period of time. Furthermore, a firm like Eastern, which has been out of the coal business for over a quarter-century, will be assigned workers only when no post-1977 NBCWA signatory can be found. So viewed, Eastern's liability will be roughly proportionate to the expectation of health benefits that it created and which have been satisfied by the industry since 1950 in a series of multiemployer plans. In situations in which a different former employer either explicitly promised benefits to a particular miner or fostered a greater expectation of benefits than did Eastern (because it employed the miner for a longer period), it will bear the concomitant burden. And, because the liability for orphaned retirees is based on the number of initial assignments made to [a signatory operator], those assignments, too, will be proportional.

Eastern Enterprises, 110 F.3d at 160-61.

The First Circuit also pointed out that, "the fact that the Coal Act contains provisions which moderate the statutory toll is also probative of a constitutionally tolerable economic impact." *Id.* at 161.

> Here, in addition to the provisions already mentioned (which relieve Eastern entirely of liability whenever a company that created a greater expectation of lifetime health benefits for an individual miner can be found), the Coal Act authorizes the use of $210 million from the 1950 Pension Plan, 26 U.S.C. § 9705, and additional moneys from the Abandoned Mine Reclamation Fund, 30 U.S.C. § 1232(h) (1994), to defray the cost of furnishing health benefits to orphaned miners. These measures, together with the contribution proviso contained in Coal Act § 9706(f)(6), support a determination that the Coal Act does not effect a taking.

Id. The transfers from the 1950 Pension Plan thus far have entirely eliminated the unassigned "orphan" and death benefit assessments to the Combined Fund. *Eastern's Brief* at 16-17 n.32. To date, Eastern has not been required to make a proportionate payment towards the health benefit premiums of even a single orphan miner. *See Eastern's Brief* at 16-17.

D. *Analysis Of An Economic Regulation Under The Takings Clause Does Not Require Proof Of A Causal Nexus.*

Eastern argues that the Court should establish an additional test in the takings analysis for economic regulation: "whether a causal nexus exists between the appropriation and the harm that the government seeks to remedy." *See Eastern's Brief* at 37. Eastern implies that a "causal nexus" has been applied previously by the Court in cases such as this. *Eastern's Brief* at 37-43. This argument, however, attempts to shoehorn the Coal Act into something which it is not, *i.e.*, a direct and permanent appropriation of private property for the government's own use. *See Eastern's Brief* at 37-43; *See also Concrete Pipe*, 508 U.S. at 643. Eastern proposes that an analysis of the statute under the Takings Clause should include consideration of a threshold nexus requirement for economic regulation akin to the nexus requirement when tangible property is seized for government use. *See e.g., Dolan* v. *City of Tigard*, 512 U.S. 374 (1994).

The purported threshold nexus requirement is constructed, however, via a fundamentally flawed analogy between cases involving the government's direct appropriation of private property for government use,[31] and cases such as *Connolly* and *Concrete Pipe*. The latter cases involve regulatory schemes designed solely to protect private pension and benefit funds, for which there exists neither physical invasion nor permanent appropriation of any private assets for the use and benefit of the government. All of the cases Eastern attempts to marshal in favor of a threshold "nexus" requirement involve appropriation of private assets *for government use*. Nowhere has it cited, nor do this Court's decisions support, such a requirement for economic regulation that procures no largess for the government itself. *See Concrete Pipe*, 508 U.S. at 643. Therefore, Eastern's analogy cannot be sustained.

At least Davon, Inc., in its amicus brief, is more candid when it admits that it is asking the Court to add a "causal nexus" as a new standard in its analysis of the Takings Clause in cases such as this. *See Brief of Amicus Curiae, Davon, Inc.* (submitted in support of Petitioner) at 7. Moreover, even if the Court were persuaded to adopt such a nexus requirement for review of economic regulation under the Takings Clause, the required nexus between Eastern's assessed liability under the Coal Act and its contribution to the problem sought to be remedied is readily found. In short, "[t]here is no such thing as mining coal and yet having no involvement in the crisis confronting health care financing and delivery in the coal

[31] *See Dolan, supra*, (county's attempt to condition approval of construction permit upon petitioner's dedication of land for public purposes unrelated to proposed development constitutes a violation of Takings Clause); *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 163 (1980) (county's retention of interest earned on interpleader account in addition to fee charged for managing the account was not merely an adjustment to "benefits and burdens of economic life to promote the common good," but rather a "forced contribution to general governmental revenues").

industry." *Coal Commission Report,* JA 325a (statement of Vice Chairman Henry H. Perritt).

CONCLUSION

For all of the foregoing reasons, Respondents, Peabody Holding Company, Inc., Eastern Associated Coal Corp., and Coal Properties Corp. respectfully request that this Court affirm the decision of the First Circuit Court of Appeals that as applied to Eastern Enterprises the Coal Act is constitutional under the Due Process Clause and under the Takings Clause of the Fifth Amendment.

Respectfully submitted,

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